Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1996

AMERICAN INVESTORS LIFE INSURANCE COMPANY, PETITIONER

v.

PATRICIA KATHLEEN HUDSON, RESPONDENT

On Petition for a Writ of Certiorari to the Arkansas Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. Does the denial of the Petitioner's right to collaterally attack a previous adverse finding of liability made prior to Petitioner's joinder as a party Defendant violate due process guaranteed by the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Arkansas Court of Appeals and the Petition for Review to the Arkansas Supreme Court were American Investors Life Insurance Company and Patricia Kathleen Hudson as Executrix of the Estate of Pat K. Savelle, Deceased.

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PETITION FOR A WRIT OF CERTIORARI

American Investors Life Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Court of Appeals and the denial of the Petition for Review by the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals (App. at 10a) is reported at 935 S.W.2d 594 (Ark. App. 1996). The denial of the Petition for Rehearing (App. at 33a) is unreported. The denial of the Petition for Review by the Arkansas Supreme Court (App. at 36a) is unreported.

JURISDICTION

The Chancery Court of Sebastian County, Arkansas issued its Decree and Judgment on May 31, 1995. A timely Notice of Appeal was filed on June 21, 1995. The Arkansas Court of Appeals, en banc, issued its opinion on December 23, 1996. A timely filed Petition for Rehearing was denied on January 29, 1997 and the Petition for Review by the Arkansas Supreme Court was denied on February 10, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AMENDMENTS INVOLVED

The Fourteenth Amendment to the United States Constitution is reproduced in the Appendix.

STATEMENT OF THE CASE

This litigation has a long and extensive history, both at the trial court level and on appeal. The litigation involves the continuing effort on the part of Patricia Kathleen Hudson as Executrix of the Estate of Pat Kay Savelle to collect medical and life insurance benefits under a group insurance plan covering Ms. Savelle who died on or about April 28, 1996. In 1985, Pat Savelle filed a Complaint against the Trustees of the Arkansas Nursing Home Association Employee Benefit Trust seeking a declaratory judgment that her medical coverage benefits under a group plan issued by the Arkansas Nursing Home Association Employee Benefit Trust was valid. Summary judgment was initially entered in June of 1986 in her favor; however, the judgment was later vacated because Ms. Savelle died prior to the entry of the judgment.

On September 17, 1987, Patricia Kathleen Hudson was substituted as Plaintiff of record as a result of the death of Pat Savelle. Plaintiff then filed an Amended Complaint seeking, in addition to the medical and life insurance benefits, death benefits. At this stage of the litigation, Petitioner, American Investors Life Insurance Company was not a party. On July 28, 1989, the trial court granted summary judgment in favor of Patricia Kathleen Hudson and against the Trustees of the Arkansas Nursing Home Association Employee Benefit Trust. On appeal, the Arkansas Court of Appeals affirmed the judgment of the trial court against the Trustees, but modified the judgment by eliminating a statutory penalty included in the lower court judgment. Subsequent to the first appeal to the Arkansas Court of Appeals, Patricia Kathleen Hudson filed a motion in the trial court asking for a specific monetary award which was subsequently granted by the trial court in the amount of $53,421.72 plus interest. That judgment, entered April 8, 1992, was timely appealed by the Trustees of the Trust, who were the sole Defendants, and the Arkansas Court of Appeals affirmed as modified only as to the validity of a portion of the damages awarded. Although American Investors Life Insurance Company was not a party

to the case at the time a money judgment was entered by the trial court, the Plaintiff presented evidence concerning American Investors' liability for the judgment as a successor in interest to the Trust, and indeed the trial court made specific findings that American Investors was a successor in interest to the Trust and was responsible for the judgment entered against the Trust.

After the second appeal to the Arkansas Court of Appeals, and specifically on September 9, 1993, Patricia Kathleen Hudson filed an amended complaint in which she asserted that Petitioner American Investors Life Insurance Company was the successor in interest to the Arkansas Nursing Home Association Employee Benefit Trust and alleging that American Investors was the party responsible for all sums due and owing to Patricia Kathleen Hudson. In its first appearance in the litigation, American Investors Life Insurance Company filed an answer denying that it was the successor in interest to the Trust or that it was responsible in any manner for the judgment entered in favor of Patricia Kathleen Hudson and against the Trust and the named Trustees.

Following a denial of a Motion for Summary Judgment filed on behalf of American Investors Life Insurance Company and after a hearing, the Chancery Court of Sebastian County, Arkansas, on May 31, 1995, entered its judgment finding that American Investors Life Insurance Company was estopped to claim that it was not responsible for full satisfaction of the judgment in favor of Patricia Kathleen Hudson because the Court's ruling in its order filed April 8, 1992, prior to American Investors Life Insurance Company being joined as a party, had already found that American Investors Life Insurance Company was the successor in interest to the Defendant Trust and thus responsible for the payment of the judgment.

American Investors Life Insurance Company timely filed its Notice of Appeal to the Arkansas Court of Appeals from the Decree in

Judgment entered May 31, 1995, on June 21, 1995. The Arkansas Court of Appeals, en banc, on December 23, 1996, subject to a dissenting opinion, affirmed the trial court's ruling that American Investors Life Insurance Company was estopped from collaterally attacking the trial court's April 8, 1992 finding that American Investors Life Insurance Company was the successor in interest to the named Defendant Trust despite the fact that American Investors was not a named party at the time of the trial court's finding of liability and that American Investors had no opportunity to present evidence regarding the liability, if any, it assumed.

American Investors Life Insurance Company, on January 8, 1997, filed a timely Petition for Rehearing asserting the denial of its constitutional right of due process by predicating liability without a full and fair opportunity to defend (App at 31a). In a letter opinion filed January 29, 1997, the Arkansas Court of Appeals denied the Petition for Rehearing (App at 33a).

American Investors Life Insurance Company further filed on January 8, 1997 a Petition for Review of the decision of the Arkansas Court of Appeals to the Arkansas Supreme Court. American Investors Life Insurance Company asserted therein its denial of the constitutionally protected right of due process (App at 35a). The Arkansas Supreme Court, in a letter opinion filed February 10, 1997, denied the Petition for Review (App at 36a).

REASONS FOR GRANTING THE PETITION

The Fourteenth Amendment to the United States Constitution provides, in part, that "nor shall any state deprive any person of life, liberty or property without due process of law". (App at 37a) The United States Supreme Court is charged with ultimate authority to review state court decisions in which "any title, right, privilege or immunity is specially set up or claimed, under the Constitution." 28 U.S.C. § 1257(a). Although Petitioner's constitutional due process claim was adequately and timely raised in both its Petition for Rehearing before the Arkansas Court of Appeals and the Petition for Review to the Arkansas Supreme Court, Arkansas' highest appellant court refused to address the constitutional claim of American Investors Life Insurance Company regarding its denial of due process as guaranteed by the United States Constitution.

The Chancery Court of Sebastian County, Arkansas, on May 31, 1995, entered judgment against Petitioner, American Investors Life Insurance Company, in the amount of $64,977.94 representing amounts found to be owed to the Respondent for certain medical charges incurred prior to April, 1986 (App at 9a). The trial court, as the basis for its finding of liability against the Petitioner, relied exclusively upon its prior judgment of April 8, 1992 wherein it specifically found that Petitioner assumed responsibility for claims such as the one asserted by the Respondent herein for benefits (App at 4a). At the time of this finding, Petitioner was not a party Defendant in the litigation and therefore had no opportunity to fully and fairly litigate its position that it was not liable for any such claims (App at 5a). At the hearing on the merits prior to the entry of the trial court's order of May 31, 1995, Petitioner attempted to introduce evidence regarding the claim that it did not assume liability for any medical expenses of the Respondent and further attempted to provide testimony regarding its involvement. The trial court specifically held that Petitioner could not collaterally attack the previous finding of the trial court in its April 8,

1992 judgment that Petitioner was responsible for the claims of the Respondent (App at 6a).

American Investors Life Insurance Company was not joined as a party to the proceedings until September 9, 1993 (App at 5a). The trial court specifically found that Respondent had knowledge as of September, 1990, that additional parties should possibly be named Defendants in the proceedings (App at 8a). For whatever reason, Respondent failed to add additional parties, including Petitioner, until after the trial court's April 8, 1992 finding of liability on the part of Petitioner. It is clear from the lengthy Decree and Judgment entered by the Chancery Court of Sebastian County, Arkansas that Petitioner was not accorded an opportunity to fairly and fully litigate the liability, if any, assumed for the payment of medical expenses incurred by the Respondent (App at 6a). It is critical to keep in mind that American Investors Life Insurance Company never issued a policy of insurance to Pat Savelle. In fact, American Investors was not in existence on the date of Mrs. Savelle's death.

The Arkansas Court of Appeals in its opinion delivered December 23, 1996, affirmed the trial court holding that both *res judicata* and collateral estoppel prevented Petitioner from collaterally attacking the prior finding of liability rendered before Petitioner was a named party Defendant. (App at 17a-19a).

The United States Supreme Court has consistently reiterated the importance of a full and fair opportunity to litigate:

> Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard. Some litigants - those who never appeared in a prior

> action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due Process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313, 329 (1971).

Litigants must have a full and fair opportunity to litigate in order to comport with the requirements of the United States Constitution. In the case before this Court, Petitioner had no opportunity to litigate the critical issue of whether or not it assumed the liabilities of the Arkansas Nursing Home Employee Benefit Trust. The denial of this opportunity, in light of the factual findings and history of the case as stated by the trial court and the Arkansas Court of Appeals, clearly violates the constitutional right of American Investors Life Insurance Company to due process of law as guaranteed by the Fourteenth Amendment.

The finding by the trial court of privity between American Investors Life Insurance Company and the original Defendant in this litigation, Arkansas Nursing Home Association Employee Benefit Trust, is nothing more than a non-constitutional ground upon which to affirm a decision not supported in state law. The United States Supreme Court has long held that "this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of Federal Rights rests upon a valid non-federal ground and whether that ground finds fair or substantial support in state law. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969). The trial court, as affirmed by the Court of Appeals, simply put forth the doctrine of privity to reach a decision unsupported by the facts to sustain liability on the part of American Investors Life Insurance Company. In reading the Court of Appeals decision, the court merely adopted the trial court's

determination that American Investors cannot collaterally attack the previous findings rendered prior to Petitioner being a named party. Petitioner had no opportunity to litigate its liability, if any, for the claims asserted by the Respondent. Petitioner has been denied due process guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APRIL 1997

APPENDIX

APPENDIX

IN THE CHANCERY COURT OF SEBASTIAN COUNTY,
ARKANSAS
FORT SMITH DISTRICT

E-85-388 (I)

PATRICIA KATHLEEN HUDSON

Plaintiff,

v.

MAURY BARNES, KENNETH K. YARBROUGH, ANN WIGGINS, MELVIN NUSSBAUM, PERRY WILSON AND ANY SUCCESSORS IN INTEREST THERETO AS TRUSTEES OF THE ARKANSAS NURSING HOME ASSOCIATION EMPLOYEE BENEFIT TRUST, AND AMERICAN INVESTORS LIFE INSURANCE COMPANY

Defendants,

DECREE AND JUDGMENT

Now on this 31st day of May, 1995, this cause comes on before this Court for final determination after having been presented previously for hearing, but taken under advisement for further Memorandum Briefs of Counsel. WHEREUPON, the Plaintiff appeared by representative, Mr. James Hudson, husband of the Plaintiff

and son-in-law of Pat Savelle, Deceased, and by and through her Counsel of record Hardin, Jesson, Dawson & Terry, by Honorable Rex Terry; and the Defendants appeared by representative, Robert Alexander, and by Counsel of record, Skokos & Coleman, by Honorable George J. Bequette, Jr.; and the Court, having considered all of the evidence adduced, both oral and documentary, the arguments and statements of Counsel both at hearing and in supplemental briefs and correspondence, and the previous Orders of this Court and the Arkansas Court of Appeals in this matter, and being well and sufficiently advised in the premises, does find:

I.

That this Court has Jurisdiction and Venue of the parties and of the subject matter herein.

II.

Prior to the hearing in this matter, the Defendant, American Investors filed a Motion for Summary Judgment, with supporting documents, to which the Plaintiff responded, also with supporting documents. The Court apprised the parties to this matter, acting through their Counsel, by letter of March 21, 1994, that in the Court's view, there were material facts at issue and the Motion would be fully considered as a part of the hearing on the merits which the Court conducted at the hearing as scheduled. That thereupon the Court specifically finds that the Motion for Summary Judgment filed by Defendant, American Investors should be denied.

III.

Plaintiff obtained a Judgment in this Court on August 2, 1989, as against all Defendants except American Investors Life Insurance Company, which was not then a party. The Judgment held in favor the

Plaintiff, granting her Complaint for declaratory judgment. The basis of the Court's holding was that Plaintiff's Decedent, Pat Savelle, continued to be entitled to all health insurance coverage, including death benefit coverage, beyond termination of her employment date through the date of her death, which was on April 28, 1986.

IV.

From the declaratory judgment of this Court, Defendants perfected an appeal. On June 27, 1990, the Court of Appeals of Arkansas, in action No. CA-89-368, affirmed this Court's Decree in every respect except the award of 12% penalty. The Court's Mandate was issued to this Court on July 17, 1990.

V.

Pursuant to the declaratory judgment of this Court, as affirmed, Plaintiff then submitted to the Defendants (except American Investors Life Insurance Company, at that time a party to this case), her total claim for medical bills and the death benefit. Defendants defended against the claim for specific medical bills, alleging entitlement to certain offsets from the total amount claimed by Plaintiff. The actual amount owed was the subject of a hearing on July 18, 1991, before this Court. On April 8, 1992, the Court entered its Order and Judgment with respect to the specific amounts owed, finding that Plaintiff was entitled to the amount of the claim presented from the Defendants, and awarding Plaintiff Judgment in specific amounts, including her attorneys fees. The Court further found that the representative who appeared on behalf of Defendant, Robert Alexander, testified that he was an attorney for American Investors Life Insurance Company, that Fewell & Associates was the third-party administrator for the Arkansas Nursing Home Association Employee Benefit Trust in 1984, when the Trust was terminated; that in August, 1984, after the April 8, 1984 termination of the Trust, Fewell & Associates caused to be paid some

$13,000.00 in claims to St. Edward Mercy Medical Center on behalf of Mrs. Savelle, the decedent herein concerned. Mr. Alexander further testified that after termination of the Arkansas Nursing Home Association Employee Benefit Trust, Fewell & Associates administered several self-funded plans, and moved the nursing home trust into another trust called the Employer Benefit Group, which was the successor in interest to the Arkansas Nursing Home Association Employee Benefit Trust. He further acknowledged the fact that the fact of termination of the Arkansas Nursing Home Association Employee Benefit Trust was not disclosed to the Plaintiff or to Mrs. Savelle, although the means of the disclosure of that information was at all times controlled by Mr. Alexander's employer. Mr. Alexander further testified that after April 1, 1984, the Employer Benefit Group took over responsibility for claims that occurred prior to April 1, 1984, and that the Group paid claims on behalf of Mrs. Savelle which pre-existed the April 1, 1984, termination date of the Arkansas nursing Home Association Employee Benefit Trust.

VI.

The Court further found in its Order of April 8, 1992, that effective January 1, 1986, Fewell & Associates began administering claims such as the one in the case under consideration on behalf of Paramount Life. On January 1, 1989, the effective date of the sale of Paramount Life, American Investors Life Insurance Company, an Arkansas domestic insurance company, assumed responsibility for claims such as the one in the case at bar. Mr. Alexander testified that American Investors Life Insurance Company assumed the claims that were outstanding as of January 1, 1989, which specifically included the claim of the Plaintiff in this action. The Court made certain other findings with respect to Mr. Alexander's testimony, as more particularly set forth in its Order of April 8, 1992. Specifically, this Court entered personal Judgments against the individual Defendants in this matter for all amounts due and owing, as well as Judgment against the Defendant

Trust. The Court recited that it specifically retained jurisdiction of the matter for the purpose of joining American Investors Life Insurance Company as an additional party for further proceedings against it which may be necessary, in the event of inability of the Plaintiff to collect the judgment awarded.

VII.

The Defendants appealed from the Court's Order and Judgment of April 8, 1992, to the Arkansas Court of Appeals. On June 30, 1993, that Court, in Case No. CA 92-834, affirmed the Judgments both against the Trust and the individual trustees, but modified the Judgment to the extent that the Court allowed a set-off in the amount of $2,444.40, and to the extent that the Judgment allowed post-judgment interest from the date of the original judgment for declaratory judgment, rather than from the April 8, 1992, date of the Order and Judgment which gave Judgment in amounts certain. The Order and Judgment was otherwise affirmed in all respects.

VIII.

On September 9, 1993, the Judgment in favor of Plaintiff having not been satisfied, Plaintiff filed an amendment to Complaint in Order to Join American Investors Life Insurance Company as a party and alleging entitlement to Judgment against it for the amounts set forth in the amendment to Complaint.

IX.

Defendant, American Investors insists that it is not responsible for any sums due and owing to the Plaintiff under the previously awarded judgments by the Court. On the contrary, the Court concludes that Defendant American Investors is fully liable for all sums due and owing to the Plaintiff, previously affirmed by the Arkansas Court of

Appeals. In so concluding, the Court has considered the testimony of the Plaintiff's representative, James Hudson, and the Defendants' representative, Robert Alexander, who had also previously testified for and on behalf of the other Defendants who are trustees of the Arkansas Nursing Home Association Employee Benefit Trust. The Court is persuaded, consistent with Mr. Alexander's previous testimony in this matter, that American Investors assumed the claims that were outstanding as of January 1, 1989. Those claims necessarily included the claim of the Plaintiff's decedent, Pat Savelle, which claim has been held valid by this Court in a previous proceeding, and which was affirmed by the Arkansas Court of Appeals. Thus the Defendant American Investors' position that the claim is not valid because Ms. Savelle terminated her employment prior to the termination of the Trust, is wholly without merit, that issue having been conclusively determined by this Court, and the Arkansas Court of Appeals, in previous proceedings. Defendant, American Investors cannot collaterally attack those previous findings of the Court. That is particularly true here, since at all times, all Defendants have been represented by the same able attorneys, and have been represented at hearings by the same representative, namely, Robert Alexander.

X.

The Court is persuaded that American Investors, or persons acting on its behalf, knew at all relevant phases of this litigation, as did Fewell & Associates, as did Robert Alexander and his predecessor, the Claims Manager whom he identified at the hearing in this matter, that the claim of the Plaintiff's decedent, and later the Plaintiff, was in existence, was being aggressively defended and litigated by the Nursing Home Trust, and that neither the Nursing Home Trust nor any of the Trustees had raised the claim that the Trust had been terminated on April 1, 1984. According to the uncontroverted evidence before the Court, it was not until after the appeal decision of the Court of Appeals on June 27, 1990, and the presentation by Plaintiff of her claims to the

Defendants, that Plaintiff or her Counsel had any knowledge of the termination of the Trust. It would be unfair and inequitable for this Court to allow the Defendant to profit from a situation in which a Trust was terminated, over one year prior to the time that this lawsuit was filed, where the Plaintiff was never so informed. Defendant American Investors would be allowed to profit from that if this Court were to find in its favor. Under these circumstances, the Defendant American Investors had a duty to speak, because at all times it had knowledge of the termination of the Trust, but failed to disclose it until after the decision by the Court of Appeals in the initial appeal.

XI.

It was clear at both the July, 1991 and March, 1994 hearings that Robert Alexander was at all times aware of the salient facts, and that personnel at American Investors knew the facts, since the date of the initial Trust termination in April, 1984. The initial Trust Agreement for the Arkansas Nursing Home Association Employee Benefit Trust states that upon termination, trustees must pay all obligations of the Trust, and must use the fund to continue insurance on employees insured under the policies and the families of employees, and must act to protect the employees that were insured at the time of the termination of the policies. Further, the Trust instrument recites that the trustees shall pay all obligations of the Trust. Robert Alexander testified previously in this matter that the Trust accomplished this by providing for the assumption of certain liabilities upon termination.

XII.

The Court finds that Plaintiff has suffered a wrong, and cannot be left by this Court of equity without a remedy. The evidence clearly establishes that the remedy should be against Defendant, American Investors, on the basis of the testimony of Robert Alexander, and the evidence adduced both at the July, 1991 and March, 1994 hearings.

Moreover, a Court of equity regards as done that which ought to be done. Under the circumstances presented by this case, Plaintiff's claim is a liability which should have been assumed in the various assumptions entered into by certain entities after the April 1, 1984 termination of the Trust.

XIII.

Pursuant to the equitable doctrines of estoppel and waiver, American Investors is estopped to claim that it is not responsible for full satisfaction of the Judgment in favor of Plaintiff in this matter. At all times, Defendant, American Investors had knowledge of these transactions, and unquestionably had a duty to speak. Robert Alexander testified that he supervised this litigation matter from the time he became an employee. At any time during the course of the proceeding, he could have notified the Plaintiff, her Counsel, or his own attorneys, with respect to the termination of the Trust, but did not do so until September, 1990, after the first appeal to the Arkansas Court of Appeals. Robert Alexander admitted that his attorney in this matter has been reporting either to him or his predecessor at American Investors throughout this matter. He further testified that Fewell & Associates, third-party administrator, is a sister company of American Investors.

XIV.

The hearing in this matter revealed no conflict with respect to the amounts owed, as set forth in the Amendment to Complaint by Plaintiff, previously established by this Court, and as affirmed in two appeals to the Arkansas Court of Appeals. The amount due and owing to the Plaintiff through the date of the hearing, as set forth in the Plaintiff's post-trial memorandum filed herein, is $55,727.07, plus accrued costs of $224.19. The amounts due and owing to the Plaintiff, having previously been determined by the Court, and having been affirmed only as modified, accrue interest at a Judgment rate of 10% per

annum, or $12.7637 per day. Defendant, American Investors, in its reply to the Plaintiff's post-trial memorandum, took no issue with the amounts due and owing as set forth in the Plaintiff's post-trial memorandum. The Court further finds that plaintiff is entitled to an additional fee for her attorneys in the amount of $3,500.00. Since the hearing in this matter, interest on the Plaintiff's Judgment against other Defendants in this matter has accrued in the amount of $5,526.68 through June 1, 1995, is $61,253.75, plus $224.19 in accrued Court costs. For prevailing as against the Defendant, American Investors, which necessitated the additional effort by the Plaintiff, Plaintiff is entitled to an additional fee for her attorneys in the amount of $3,500.00.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED, that the Motion of Defendant, American Investors Life Insurance Company be denied; that Plaintiff do have and recover of and from the Defendant, American Investors Life Insurance Company, Judgment in the total sum and amount of $61,253.75, plus additional attorneys fees of $3,500.00, plus accrued Court costs, which have to date accrued in the amount of $224.19; that all of these amounts bear in interest at a Judgment rate of 10%; that for all of these amounts, execution or garnishment may issue.

/s/ Warren O. Kimbrough
CHANCELLOR, DIVISION I

EN BANC

ARKANSAS COURT OF APPEALS

Case No. CA 95-970
Opinion Delivered 12/23/96

Appeal from Sebastian County Chancery Court
Honorable Warren O. Kimbrough, Chancellor
Affirmed

AMERICAN INVESTORS LIFE INSURANCE COMPANY,
APPELLANT

v.

PATRICIA KATHLEEN HUDSON, APPELLEE

MELVIN MAYFIELD, Judge

This is the third appeal of this case in this court. It involves the continuing attempt of the appellee, Patricia Kathleen Hudson as Executrix of the Estate of Pat K. Savelle, to collect medical and life insurance benefits under a group insurance plan covering Pat Savelle who died on April 28, 1986.

In 1985, Pat Savelle filed a complaint seeking a declaratory judgment holding that her medical coverage benefits under a group policy issued by the Arkansas Nursing Home Employee Benefit Trust was valid and should be continued until she was no longer totally disabled. Summary judgment was entered June 12, 1986, in her favor.

However, this judgment was later vacated because Ms. Savelle died prior to its entry.

On September 17, 1987, the present appellee was substituted as party plaintiff. Appellee then filed an amended complaint realleging and adopting the allegations of the original complaint and seeking, in addition, death benefits as provided by the plan. On July 28, 1989, summary judgment was granted for appellee against "Maury Barnes, Kenneth K. Yarbrough, Ann Wiggins, Melvin Nussbaum, Perry Wilson, and any successors in interest thereto, as Trustees of the Arkansas Nursing Home Association Employee Benefit Trust." (American Investors Life insurance Company was not then a party.) The trial court granted the appellee's complaint for declaratory judgment on the basis that Pat Savelle continued to be entitled to all health insurance coverage, including death benefit coverage, beyond the termination of her employment through the date of her death, April 28, 1986. On August 24, 1989, "Maury Barnes, et al" filed a notice of appeal, and in an unpublished opinion handed down June 27, 1990, this court affirmed the judgment in every respect except for an award of statutory penalty.

Subsequently, the appellee filed a motion asking the trial court for a money judgment, consistent with her declaratory judgment, for unpaid medical bills and life insurance benefits, plus interest, costs, and attorney's fees. The defendants opposed the claim for some medical bills alleging entitlement to certain offsets. A hearing was held in July 1991, on the actual amount due appellee and in an order entered April 8, 1992, the trial court found the appellee was entitled to the amount of the claim presented and granted appellee judgment in a specific amount, including attorney's fees. The trial court's finding was based in part upon the testimony of Robert Alexander, an attorney for American Investors Life Insurance Company, who appeared on behalf of the defendants. The trial court entered judgment not only against the trust as an entity, but also against the individual trustees, for all amounts. And the court also found that American Investors was the successor in interest to the trust and was also responsible for the judgment, and the

court specifically reserved jurisdiction for the sole purpose of joining American Investors as an additional party for further proceedings against it which might be necessary in the event appellee was unable to collect the judgment awarded.

Thereafter on May 7, 1992, a notice of appeal was filed which stated that "Maury Barnes, Kenneth K. Yarbrough, Ann Wiggins, Melvin Nussbaum, Perry Wilson, and any Successors in Interest thereto, as Trustees of the Arkansas Nursing Home Association Employee Benefit Trust, Defendants" appeal the order entered April 8, 1992. In an unpublished opinion handed down June 30, 1993, this court affirmed the judgments against the trust and the individual trustees, but modified the amount of judgment by reducing it by an amount that had been written off by Cooper Clinic, and by eliminating post-judgment interest prior to April 8, 1992.

On September 9, 1993, the judgment not having been satisfied, appellee filed an amended complaint in which she asked that the appellant American Investors be added as an additional party and for judgment against that appellant also as a successor in interest. American Investors was made a party and answered denying most of the allegations of the complaint stating, "Since American Investors was not previously a party to the litigation, American Investors is without sufficient information to admit or deny the material allegations," and on March 14, 1994, it filed a motion for summary judgment on the basis that the order of April 8, 1992, was ineffective against it because it was not served with legal process or notice and it was not a successor in interest to the trust or responsible for the trust's liabilities.

After a hearing held March 25, 1994, the trial court entered a well reasoned and comprehensive opinion holding that appellant was fully liable for all sums due the appellee. The trial court awarded judgment in favor of the appellee in the amount of $61,253.75, plus attorney's fees and accrued costs. Because of its completeness, we quote extensively from the trial court's decree and judgment. We also point out that the appeal from this judgment is only by American Investors Life Insurance Company (American Investors) and hereafter

our reference to appellant without other designation will be to that appellant. The trial court's decree states in part, as follows:

III.

> Plaintiff obtained Judgment in this Court on August 2, 1989, as against all Defendants except American Investors Life Insurance Company, which was not then a party. The Judgment held in favor of the Plaintiff, granting her Complaint for declaratory judgment. The basis of the Court's holding was that Plaintiff's Decedent, Pat Savelle, continued to be entitled to all health insurance coverage, including death benefit coverage, beyond termination of her employment date through the date of her death, which was on April 28, 1986.

IX.

> Defendant, American Investors insists that it is not responsible for any sums due and owing to the Plaintiff under the previously awarded judgments by the Court. On the contrary, the Court concludes that Defendant American Investors is fully liable for all sums due and owing to the Plaintiff, previously affirmed by the Arkansas Court of Appeals. In so concluding, the Court has considered the testimony of the Plaintiff's representative, James Hudson, and the Defendants' representative, Robert Alexander, who had also previously testified for and on behalf of the other Defendants who are trustees of the Arkansas Nursing Home Association Employee Benefit Trust. The Court is persuaded, consistent with Mr. Alexander's previous testimony in this matter, that

American Investors assumed the claims that were outstanding as of January 1, 1989. Those claims necessarily included the claim of the Plaintiff's decedent, Pat Savelle, which claim has been held valid by this Court in a previous proceeding, and which was affirmed by the Arkansas Court of Appeals. Thus the Defendant American Investors' position that the claim is not valid because Ms. Savelle terminated her employment prior to the termination of the Trust, is wholly without merit, that issue having been conclusively determined by this Court, and the Arkansas Court of Appeals, in previous proceedings. Defendant, American Investors cannot collaterally attack those previous findings of the Court. That is particularly true here, since at all times, all Defendants have been represented by the same able attorneys, and have been represented at hearings by the same representative, namely, Robert Alexander.

X.

The Court is persuaded that American Investors, or persons acting on its behalf, knew at all relevant phases of this litigation, as did Fewell & Associates, as did Robert Alexander and his predecessor . . . that the claim of the Plaintiff's decedent, and later the Plaintiff, was in existence, was being aggressively defended and litigated by the Nursing Home Trust, and that neither the nursing home Trust nor any of the Trustees had raised the claim that the Trust had been terminated on April 1, 1984 . . . . It would be unfair and inequitable for this Court to allow the Defendant to profit from a situation in which a Trust was terminated, over one year prior

to the time that this lawsuit was filed, where the Plaintiff was never so informed. Defendant American Investors would be allowed to profit from that if this Court were to find in its favor. Under these circumstances, the Defendant American Investors had a duty to speak because at all times it had knowledge of the termination of the Trust but failed to disclose it until after the decision by the Court of Appeals in the initial appeal.

XI.

It was clear at both the July, 1991 and March, 1994 hearings that Robert Alexander was at all times aware of the salient facts, and that personnel at American Investors knew the facts since the date of the initial Trust termination in April, 1984. The initial Trust Agreement for the Arkansas Nursing Home Association Employee Benefit Trust states that upon termination trustees must pay all obligations of the Trust and must use the fund to continue insurance on employees insured under the policies and the families of employees and must act to protect the employees that were insured at the time of the termination of the policies. Further, the Trust instrument recites that the trustees shall pay all obligations of the Trust. Robert Alexander testified previously in this matter that the Trust accomplished this by providing for the assumption of certain liabilities upon termination.

XII.

> . . . Under the circumstances presented by this case, Plaintiff's claim is a liability which should have been assumed in the various assumptions entered into by certain entities after April 1, 1984 termination of the Trust.

XIII.

> Pursuant to the equitable doctrines of estoppel and waiver, American Investors is estopped to claim that is not responsible for full satisfaction of the Judgment in favor of Plaintiff in this matter. At all times, Defendant, American Investors had knowledge of these transactions, and unquestionably had a duty to speak. Robert Alexander testified that he supervised this litigation mater from the time he became an employee. At any time during the course of the proceeding, he could have notified the Plaintiff, her Counsel, or his own attorneys, with respect to the termination of the Trust, but did not do so until September, 1990, after the first appeal to the Arkansas Court of Appeals. Robert Alexander admitted that his attorney in this matter has been reporting either to him or his predecessor at American Investors, throughout this matter. He further testified that Fewell & Associates, third-party administrator, is a sister company of American Investors.

In its appeal from the above decree and judgment, the appellant argues the chancellor's order is clearly erroneous "because the record is barren of any facts that prove it was the successor in interest to the Trust and/or . . . assumed liabilities of the Trust for the claims made by

Appellee." Appellant argues that the trial court's finding that it was the successor in interest to the Trust and the responsible party is clearly against the preponderance of the evidence.

The problem with appellant's argument is that the trial court held appellant estopped to claim that it is not responsible for full satisfaction of the judgment.

In Robinson v. Buie, 307 Ark. 112, 817 S.W. 2d 431 (1991), our supreme court stated:

> Under the doctrine of res judicata or claim preclusion, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. Privity of parties within the meaning of res judicata means "a person so identified in interest with another that he represents the same legal right." Res judicata bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could have been litigated. Collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit.

307 Ark. at 114, 817 S.W. 2d at 432-33 (citations omitted).

And in Arkansas Department of Human Services v. Dearman, 40 Ark. App. 63, 842 S.W. 2d 449 (1992), we discussed the doctrine of collateral estoppel. We stated:

> The question of who may be bound by a judgment is considered in Freidenthal, Kane and Miller, Civil Procedure § 14.9 (1985). In discussing

the general issue underlying collateral estoppel, the authors state:

> When an issue has been litigated fully between the parties, spending additional time and money repeating this process would be extremely wasteful. This is particularly important in an era when the courts are overcrowded and the judicial system no longer can afford the luxury - if it ever could - of allowing people to relitigate matters already decided.

Id. at 658. The authors also state that this doctrine applies only to persons who were parties or who are in privity with persons who were parties in the first action and that persons in a privity relationship are deemed to have interests so closely intertwined that a decision involving one necessarily should control the other. Id. § 14.13 at 682-83.

It has been suggested that privity is merely a word used to say that the relationship between one who is a party and another person is close enough that a judgment [sic] that binds the one who is a party should also bind the other person. This is the view taken in 18 Wright, Miller, and Cooper, Federal Practice and Procedure § 4448 (1981) where it is stated:

> As to privity, current decisions look directly to the reasons for holding a

> person bound by a judgment. This method should be adopted generally so that a privity label is either discarded entirely or retained as no more than a convenient means of expressing conclusions that are supported by independent analysis.
>
> The Arkansas Supreme Court has said that privity within the meaning of res judicata means a person so identified in interest with another that he represents the same legal right. In Restatement (Second) of Judgments § 39 (1982) it is stated that "a person who is not a party to an action but who controls or substantially participates in the control of the present action on behalf of a party is bound by the determination of issues decided as though he were a party." It has also been held that the identity of parties or their privies for res judicata purposes is a factual determination of substance, not mere form.

40 Ark. App. at 67-68, 842 S.W. 2d at 451-52 (citations omitted).

Under the law as cited above, we do not think the trial court erred in holding that the appellant is estopped from claiming it is not responsible for full satisfaction of the judgment in favor of the appellee.

At this point, we want to note that the appellant filed a motion for summary judgment in this case; that the trial court advised the parties, by letter to their attorneys, that there were material facts at issue; but that no order was filed to that effect until after the evidentiary hearing had been held. Then, in the decree and judgment from which we have quoted above, the court stated that "it specifically finds that the Motion for Summary Judgment filed by the Defendant, American Investors should be denied."

In response to American Investors' motion for summary judgment, the appellee summarized the background of this litigation and stated that the court should hold the appellant estopped to deny liability in this matter.

Now, in light of that pleading, we want to also note that this case has had a long and tortuous history. A section of appellant's brief entitled "ABSTRACT OF PRIOR TESTIMONY" abstracts the testimony of Robert Alexander given at the July 1991 hearing on behalf of the Trustees long before American Investors was named as a party. At that time, Alexander testified that he had been an attorney for American Investors since September, 1988. He testified that Fewell & Associates is a third party administrator that administered the Nursing Home Association Trust, the Multiple Employer Trust that the nursing home people went into, the fully insured program for Paramount life, and then Mr. Fewell purchased American Investors and Fewell & Associates administered the business of the new insurance company. Alexander testified that he also served as staff counsel for Fewell & Associates and went to work for them in September 1988.

Alexander again testified at the hearing held March 25, 1995, again as representative for the defendants, this time including American Investors. He testified that Pat Savelle was one of the beneficiaries of the Nursing Home Trust; that the "Employer Benefit Group" took over claims that occurred prior to April 1, 1984; and that another entity called Paramount Life Insurance Company came next. Alexander testified that Fewell & Associates was the third-party administrator for the Nursing Home Trust and that it is owned by Bob Fewell who is also the president of American Investors. He said that in July 1991, the party defendants were the trustees of the Nursing Home Trust; that he was employed then as now by American Investors; and that he came as a witness to "shed any light I could on the information that I had collected." He said he came to the July 1991 hearing for Fewell & Associates and had been involved in the case at least from February 1991. He said he did not come for American Investors, but American Investors and Fewell & Associates are sister companies; that he had

gathered information in preparation for the hearing; and came to give the information he had. Alexander went to great lengths to explain why Ms. Savelle's claim was not covered. He testified her claim fell into the category of claims which were ineligible because they were incurred after April 1, 1984. He said the Employer Benefit Group (MET) assumed only claims incurred prior to April 1, 1984, that had not been paid, or so called "run-off" claims; that Ms. Savelle's claim was not a run-off claim; that it assumed no claims incurred after April 1, 1984, unless the people continued to participate; that Ms. Savelle was disabled and not able to be employed; and that her claims were incurred after April 1, 1984, and their liability was not assumed. He testified further that American Investors had no connection with the Nursing Home Trust or the Employer Benefit Group, and it only assumed claims incurred under the Paramount Life Group Policy.

However, we think the appellant was involved in this litigation from its inception. Alexander, an employee of American Investors, was also employed by Fewell & Associates during this suit. He testified as a representative on behalf of the defendants even before American Investors became a party. He was at all times aware of the facts and testified that he was "the attorney responsible for this claim at American Investors since 1988."

Under the law regarding collateral estoppel, as set out in the cases of Robinson v. Buie and Arkansas Department of Human Services v. Dearman, supra, and applying the requirements of Ark. R. Civ. P. 52 (a) that we not set aside the findings of fact made by a judge in a trial without a jury unless they are clearly erroneous or against the preponderance of the evidence, we think that the trial judge's decision in this case should be affirmed.

Affirmed

Jennings, C.J., and Robbins, Rogers and Stroud, JJ., agree.

Pittman, J., dissents.

EN BANC

ARKANSAS COURT OF APPEALS

No. CA95-970
Opinion delivered 12/23/96

AN APPEAL FROM THE CHANCERY COURT OF SEBASTIAN COUNTY

[NO. E-85-388]

HON. WARREN O. KIMBROUGH, CHANCELLOR

DISSENTING OPINION

AMERICAN INVESTORS LIFE INSURANCE COMPANY

APPELLANT

v.

PATRICIA KATHLEEN HUDSON

APPELLEE

JOHN MAUZY PITTMAN, Judge

As stated by the majority, Pat Savelle was an employee of Oak Lodge Nursing Home and had medical insurance through her employer with the Arkansas Nursing Home Association Employee Benefit Trust (hereinafter "Trust"). The personal representative of Savelle's estate,

the appellee herein, brought suit against the trustees of the Trust seeking to enforce insurance coverage and to recover medical benefits. The lower court held that Savelle continued to have coverage and that the Trust was liable and found that American Investors Life Insurance Company was a subsequent successor to the Trust and liable for appellee's claims. American Investors now appeals from that decision.

I must respectfully dissent from the majority opinion affirming the decision holding American Investors liable because I believe that the lower court erred by precluding American Investors from presenting evidence as to the liability it assumed.

Savelle became totally disabled with cancer and terminated her employment in December 1983. The Trust terminated on April 1, 1984, and the Employer Benefit Group (hereinafter "Group") insured employees of the Oak Lodge Nursing Home who elected to continue coverage and assumed runoff claims, i.e., claims incurred in the previous year but not yet submitted. The Group terminated on January 1, 1986, and a Multiple Employer Trust underwritten by Paramount Life assumed the same runoff claims. Coverage through Paramount Life terminated on December 31, 1988, and American Investors provided coverage for continuing employees of the nursing home and assumed only runoff claims.

This is the third appeal of this case. The first appeal involved the trial court's order holding that despite Savelle's termination of employment and because she was totally disabled, she was entitled to continued coverage. The trial court further found that the Trust was liable for Savelle's claims until her death on April 28, 1986. We affirmed. Savelle's estate then filed a motion in the lower court seeking to enforce the judgment against the trustees in their individual capacities. The court further held that American Investors was a successor in interest to the Trust and, based on the testimony of Robert Alexander that American Investors assumed claims outstanding as of January 1, 1989, that American Investors was liable for the judgment. The court reserved jurisdiction to name American Investors as a defendant. That decision was affirmed on appeal. American Investors

was subsequently joined as a defendant. On May 31, 1995, the court held that American Investors was liable for the original judgment and precluded American Investors from presenting any evidence of the liability it assumed because the court had previously found that American Investors was the responsible party as the successor in interest. The court further found that American Investors could not collaterally attack the court's earlier finding, that Savelle had continuing coverage despite termination of her employment, because the finding was affirmed on appeal.

American Investors now appeals the May 31, 1995, order arguing that it was not a party to the case when liability was decided by the court, that it did not have an opportunity to defend its interest, and that appellee failed to prove that it was the successor in interest to the Trust.

I believe that the court erred in refusing to consider evidence concerning the liability American Investors assumed. American Investors argues that it assumed only runoff claims and that appellee has never shown or even asserted that Savelle's claim was a runoff claim. Before American Investors can be held liable for Savelle's claim, its assumed liability must be determined.

Appellee argues that American Investors is precluded from asserting a defense because it is bound by the Court's earlier decision holding American Investors liable as successor, which was affirmed on appeal. Thus, she argues that the doctrines of "law of the case", res judicata, and collateral estoppel apply. Generally, the law of the case applies only against those who were parties to the case when the prior decision was rendered. See Hodges v. Gray, 321 Ark. 7, 901 S.W. 2d 1 (1995); McDonald's Corp. v. Hawkins, 319 Ark. 2-A, 894 S.W. 2d 136, supp'l op. (1995); Willis v. Estate of Adams, 304 Ark. 35, 799 S.W. 2d 800 (1990); Potter v. Easley, 288 Ark. 133, 703 S.W. 2d 442 (1986). The same is true for res judicata, law of the case and collateral estoppel as a basis of establishing American Investors' liability. These doctrines have no application to this fact situation because American Investors was not a party to the case when its liability was determined.

Lastly, I do not believe the "privity" doctrine has any application to the case under consideration. A person is considered to be in privity with a party when that person controls or substantially participates in the control of the present action on behalf of a party. Arkansas Dep't of Human Services v. Dearman, supra. Robert Alexander testified that he did not appear on behalf of American Investors at the hearing at which the court determined American Investors' liability. The majority opinion places emphasis on the fact that Robert Alexander is associated with Fewell and Associates and American Investors, both of which are owned by Bob Fewell. Because of Fewell and Associates' participation, the majority reasons that American Investors is now estopped from defending its interest. Privity requires that the entities have similar, non-adverse interests. Id. Fewell and Associates was a third-party administrator and, unlike American Investors, was not responsible for a judgment against the Trust. It appeared only to produce its records pertaining to its previous administration of the Trust, the Employee Benefit Group, and Paramount Life.

Because the court ruled that it had previously determined that American Investors was liable and refused to give it an opportunity to present evidence regarding the liability it assumed, the case should be remanded.

I would reverse and remand for the court to decide American Investors' liability consistent with this opinion.

IN THE ARKANSAS COURT OF APPEALS

CASE NO. CA95-970

AMERICAN INVESTORS LIFE INSURANCE COMPANY

APPELLANT

v.

PATRICIA KATHLEEN HUDSON

APPELLEE

APPELLANT'S PETITION FOR REHEARING

Appellant, American Investors Life Insurance Company, by and through its attorneys, Skokos, Bequette & Billingsley, P.A., in support of its Petition for Rehearing, alleges and states:

1. In its opinion delivered December 23, 1996, this Court, en banc, affirmed the decision of the trial court holding that Appellant was collaterally estopped from disputing previous findings made by the trial court as to Appellant's liability for Appellee's claim, which findings were made by the trial court before Appellant was made a party to the litigation. Appellant's Petition for Rehearing is predicated upon the fact that in so doing, the Court has inappropriately construed the privity doctrine in such a way as to preclude Appellant from having an opportunity to fully and fairly litigate Appellee's claim that Appellant was responsible for the judgment entered in earlier trial court proceedings to which Appellant was not a party.

2. The Court's attention is directed to Appellant's Brief in Support of its Petition for Rehearing, which accompanies this Petition.

3. Counsel for the Appellant believes and asserts that there is merit to this Petition and that it is not filed for the purpose of delay.

WHEREFORE, Appellant, American Investors Life Insurance Company, prays that this Court grant its Petition for Rehearing; that upon rehearing, this Court should either reverse the judgment of the trial court and dismiss the case, or reverse the decision of the trial court and remand for proceedings to determine Appellant's liability after having given Appellant a full and fair opportunity to litigate the allegations made against it; and for all other appropriate relief.

Respectfully submitted,

SKOKOS, BEQUETTE &
BILLINGSLEY, P.A.
By: /s/ Jay Bequette
Jay Bequette, #87012

IN THE ARKANSAS COURT OF APPEALS

CASE NO. CA95-970

AMERICAN INVESTORS LIFE INSURANCE COMPANY

APPELLANT

v.

PATRICIA KATHLEEN HUDSON

APPELLEE

BRIEF IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appellant, American Investors Life Insurance Company, by and through its attorneys, Skokos, Bequette & Billingsley, P.A., respectfully submits this Brief in Support of its Petition for Rehearing.

In an opinion delivered December 23, 1996, the judgment entered by the Sebastian County Chancery Court was affirmed by this Court, sitting *en banc*.

The trial court had held in its May 31, 1995 order that Appellant could not present evidence to collaterally attack previous findings of the trial court, made before Appellant was a party to the proceedings, that Appellant had assumed and was responsible for the claims asserted by Appellee against the trustees of the Arkansas Nursing Home Association Employee Benefit Trust (Appellant's Abstract, p. 127). Because the majority opinion handed down by this Court concluded that "the appellant was involved in this litigation from

its inception," the majority held that, while not a party at the time, Appellant was in privity with the trustees of the Trust and therefore should be collaterally estopped, once it had been made a party, from attacking the previous findings holding Appellant liable for the judgment against the Trust. However, neither the facts of this case nor the applicable law should operate to preclude Appellant from a full and fair opportunity to litigate this claim, for the effect of the majority decision is to hold Appellant, a regulated insurer in this state, liable for a claim against which it never had an opportunity to present evidence or defend.

Factual or legal support for the proposition that Appellant was in privity with the Trust is completely lacking. The majority erroneously concluded that Appellant was involved in the litigation from its inception. According to the testimony of Bob Alexander, a staff attorney at Appellant, Appellant was not even acquired until November of 1988; this litigation commenced in Sebastian County Chancery Court in May, 1985.

The majority also found that Mr. Alexander testified as a representative on behalf of the defendants even before Appellant became a party. This is simply not true. According to Mr. Alexander:

> I came to the hearing in July of 1991 for Fewell & Associates. Fewell & Associates would have had a responsibility to come to the hearing in this case because as of the third party administrator it had the records and most of the things that dealt with the case. . . . I came as a witness in the previous case to shed any light I could on the information that I had collected. I cannot say that I came for American Investors. I do not believe I came in that capacity because though my employment is with American Investors, I do work with Fewell & Associates. [emphasis supplied]

(Appellant's Abstract, pp. 144-146).

Despite the majority opinion's conclusion that Alexander was "at all times aware of the facts", Alexander testified only that "at some point in time [he] became familiar with this claim" but he could not say when. (Appellant's Abstract, p. 144). And, while the majority opinion accurately quoted Mr. Alexander as testifying that he was "the attorney responsible for this claim at American Investors since 1988," Alexander testified in his next breath that he had "not handled Mrs. Savelle's [Appellee's decedent's] claims since [he had] been with American Investors", but "became involved with it later." (Appellant's Abstract, p. 144).

Thus, the question becomes whether Appellant controlled or substantially participated in the control of this action at the time the trial court made findings that it was responsible for the judgment, on behalf of the Trust, and is bound by the trial court's findings as if Appellee was a party even though it cannot be controverted that Appellant was not a party at the time the court made findings holding it responsible for the judgment, nor had claims even been asserted against American Investors? The answer can only be an unequivocal no. This record is devoid of any claim asserted against Appellant prior to the filing by Appellee of a motion to add Appellant as an additional party and to hold it responsible for the judgment entered by the trial court. Of course, pleadings adding Appellant as a party were filed after the trial court had already made its findings holding Appellant responsible for the judgment.

The mere fact that Alexander, on behalf of Fewell & Associates, gathered records in support of the defense of the claim by the Trust, because Fewell was the third party administrator for the trust, does not justify imposing issue preclusion on Appellant. *Restatement (Second) of Judgment* § 62 (1980). Similarly, the fact that Alexander, on behalf of Fewell & Associates, testified as a witness in an earlier stage of litigation does not mean that Appellant should be bound by res judicata and precluded from presenting evidence in defense of the claim. *See Hogan v. Bright*, 214 Ark. 691. 218 S.W.2d 80 (1949). Importantly, Appellant's inability to appeal the findings made by the

trial court as to Appellant's liability for the claims of Appellee is a specific exception to the application of collateral estoppel. *RESTATEMENT (SECOND) OF JUDGMENTS* § 28 (1) (1980).

Finally, there are severe constitutional due process defects in holding Appellant liable for this judgment without a full and fair opportunity to defend. As stated in *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969), "it is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 401 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), the Supreme Court held:

> . . . [T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.
>
> Some litigants--those who never appeared in a prior action--may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

402 U.S. at 329, 91 S. Ct. at 1443.

CONCLUSION

It is well settled in Arkansas that the doctrines of res judicata, issue preclusion and collateral estoppel should be strictly construed and carefully applied. Here, a conclusion that Appellant, before it was made a party, controlled or substantially participated in the presentation on

behalf of the Trust is wholly unsupported by the evidence. Appellant was not involved in this litigation from its inception. Alexander never testified on behalf of the Trust; Alexander testified only on behalf of Fewell, the third party administrator. Alexander was not at all times aware of the facts, and although Alexander was responsible for the claim at Appellant since 1988, he testified that his job for Appellant was to handle claims as counsel and that he had not handled Appellee's claims from the inception of his employment with Appellant. Alexander became involved with Appellee's claims later.

Appellant was precluded from presenting evidence as to any assumed liabilities in defense of the claim made by Appellee. The trial court so concluded because it held that Appellant was collaterally estopped from attacking previous findings that the court made before Appellant was either made a party or the subject of allegations that is was the successor in interest to the Trust. This conclusion by the trial court, and its affirmance on appeal by this Court, is simply erroneous as a matter of fact and law. The judgment of the trial court should be either reversed and dismissed, or reversed and remanded with directions to consider the evidence presented by Appellant on the issue of whether Appellee's claims were among those assumed by Appellant.

Respectfully submitted,

SKOKOS, BEQUETTE &
BILLINGSLEY, P.A.

By: /s/ Jay Bequette
Jay Bequette, #87012

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals

Date: January 29, 1997

To:
Jay Bequette Attorney at Law
425 W. Capitol, Suite 3200
Little Rock, AR 72201

RE: CA95-970 AMERICAN INVESTORS LIFE INSURANCE COMPANY V. PATRICIA KATHLEEN HUDSON

Dear Mr. Bequette:

The Arkansas Court of Appeals made the following order today in the above styled case:

"Petition for Rehearing is denied. Pittman, J., would grant."

Sincerely,

/s/ Leslie W. Steen, Clerk

IN THE ARKANSAS COURT OF APPEALS

Case No. CA95-970

AMERICAN INVESTORS LIFE INSURANCE COMPANY

APPELLANT

v.

PATRICIA KATHLEEN HUDSON

APPELLEE

APPELLANT'S PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEALS

Appellant, American Investors Life Insurance Company, by and through its attorneys, Skokos, Bequette & Billingsley, P.A., respectfully submits its Petition for Review of Decision of the Court of Appeals.

In its opinion delivered December 23, 1996, the Arkansas Court of Appeals, en banc, affirmed the decision of the trial court holding that Appellant was collaterally estopped from disputing previous findings made by the trial court as to the Appellant's liability for Appellee's claim, which findings were made by the trial court before Appellant was made a party to the litigation. Appellant's Petition for Review is predicated upon the fact that in so doing, the Arkansas Court of Appeals has inappropriately applied the doctrine of collateral estoppel by construing the privity doctrine in such a way as to preclude

Appellant from having an opportunity to fully and fairly litigate Appellee's claim that Appellant was responsible for the judgment entered in earlier trial court proceedings to which Appellant was not a party.

This appeal involves a legal principle of major importance: application of the doctrine of collateral estoppel to a situation in which an entity, although not a party to litigation in which adverse findings were made against the entity, was held to be collaterally estopped from attacking the findings made once the entity was made a party to the proceedings. In this case, Appellant was precluded from presenting any evidence in defense of the claim made by Appellee. The trial court so ruled because it held that Appellant was collaterally estopped from attacking previous findings that the court made before Appellant was either made a party or the subject of allegations that it was the successor in interest to another entity. This conclusion by the trial court, and its affirmance on appeal by the Arkansas Court of Appeals, is simply erroneous as a matter of fact and law, is inconsistent with traditional notions of due process which guarantee a full and fair opportunity to litigate, and necessarily results in a dangerous expansion of the scope and parameters of the doctrine of collateral estoppel, a doctrine which this court has repeatedly stated is to be strictly construed.

A copy of the Appellant's Petition for Rehearing in the Arkansas Court of Appeals is appended hereto.

Counsel for Appellant certifies that this Petition for Review is filed in good faith belief that the case involves a legal principle of major importance that should be reviewed by the Arkansas Supreme Court.

Respectfully submitted,

SKOKOS, BEQUETTE &
BILLINGSLEY, P.A.
By: /s/ Jay Bequette
Jay Bequette, #87012

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals

Date: February 10, 1997

To:
Jay Bequette
Attorney at Law
3200 TCBY Tower
425 W. Capitol Avenue
Little Rock, AR 72201

RE: 97 00032 AMERICAN INVESTORS LIFE INSURANCE COMPANY V. PATRICIA KATHLEEN HUDSON

Dear Mr. Bequette:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for review is denied."

Sincerely,

/s/ Leslie W. Steen, Clerk

AMENDMENT 14

TO THE

CONSTITUTION

OF THE

UNITED STATES OF AMERICA

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.